Supreme Court, U.S.
FILED
MAR 26 1990
JOSEPH F. SAPNIOL, JR.
CLERK

No. 89-1339

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

FRANK ACKLEY,
dba VILLAGE SQUARE CHEVRON, et al.,
Petitioners,

vs.

GULF OIL CORPORATION, CHEVRON U.S.A., INC. and
CUMBERLAND FARMS, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the assignment of petitioners' franchise agreements comply with Connecticut law, thereby making the federal Petroleum Marketing Practices Act inapplicable to the transaction?

2. Were petitioner service station dealers "franchisees" under the Connecticut Petroleum Franchise Act?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Proceedings Below.

On May 31, 1986, Chevron U.S.A. sold to Cumberland Farms all of Chevron's motor fuel marketing assets in the States of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, New Jersey and Delaware (collectively the "Northeast").

Petitioners (plaintiffs below) are 12 service station dealers in Connecticut who, at the time of the sale to Cumberland, leased their service stations from Chevron pursuant to written leases and purchased gasoline from Chevron pursuant to written supply agreements. Petitioners sued Chevron and Cumberland, claiming that Chevron's sale to Cumberland did not comply with the federal Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-

2806 (the "PMPA"). Petitioners also claimed that, even if the PMPA was not violated, their dealer agreements were automatically renewed (at the prior rents) with Cumberland pursuant to the Connecticut Petroleum Franchise Act (Conn.Gen.Stat. §§ 42-133j to 42-133n).

All parties moved for summary judgment. Chevron and Cumberland set forth two separate and independent grounds for summary judgment with respect to PMPA issues: First, the sale of Chevron's ongoing business operation complied with the Connecticut law governing assignments, and therefore it did not result in a "termination" or "nonrenewal" of the dealers' franchise agreements, an essential prerequisite to any PMPA cause of action. Alternatively, even if the sale resulted in a termination or nonrenewal, the defendants fully satisfied the market withdrawal defense to a PMPA claim. Chevron and Cumberland also moved for summary judgment on the dealers' state law claims.

The district court granted summary judgment in favor of Chevron and Cumberland. *Ackley v. Gulf Oil Corp.*, 726 F.Supp. 353 (D.Conn. 1989). It held that the PMPA was not applicable to the sale, because the sale complied with Connecticut law and therefore the plaintiff dealers had failed to show either a "termination" or "nonrenewal" of their franchises.[1] The court also granted summary judgment to Chevron and Cumberland on the dealers' state law claims, holding that the Connecticut Petroleum Franchise Act was inapplicable.

The Court of Appeals affirmed, adopting the "comprehensive and well-reasoned" opinion of the district court. *Ackley v. Gulf Oil Corp.*, 889 F.2d 1280 (2d Cir. 1989).

B. Statement of Facts.

The relevant facts, which are summarized in the opinion of the district court (Pet.Appx., pp. 6-14), are as follows:

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[1] Because the district court viewed the PMPA as inapplicable, it did not reach the alternative ground on which Chevron and Cumberland relied, i.e., the existence of a lawful market withdrawal.

Chevron structured the sale to Cumberland so as to minimize its impact upon Gulf and Chevron service station dealers and to protect the continuity of dealer leases and dealer supply contracts under the Gulf and Chevron trademarks. Section 2.5 of the Asset Purchase Agreement expressly required Cumberland to assume all of Chevron's contractual commitments, including its existing dealer leases and supply agreements. Section 8.6 expressly required Cumberland, as agreements subject to the PMPA came up for renewal, to "offer, in good faith, * * * a new 'franchise' on terms and conditions which are not discriminatory" to each current dealer.

To assure the continued availability to Gulf dealers of the "Gulf" trademark, Chevron granted to Cumberland exclusive use of that trademark at northeast service stations for a period of 15-1/2 years at no royalty, with an option to renew the license indefinitely for an annual royalty of $1 million per year.[2]

Ancillary to the sale of assets, Chevron and Cumberland executed a Product Sales Agreement under which Chevron agreed to sell to Cumberland essentially the entire gasoline output of Chevron's Philadelphia refinery. This supply, along with purchases under an output agreement with a Canadian refinery and purchases on the New York Harbor Spot Market, satisfy substantially all of Cumberland's needs for fuel in the northeast market.

On February 14, 1986, after the Asset Purchase Agreement was signed but before the sale closed, Chevron sent formal notices of nonrenewal under the PMPA to all Gulf and Chevron branded dealers affected by the sale. Those notices stated that Chevron did not believe that its sale to Cumberland involved a termination or

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[2] To accomodate those dealers who operated under the "Chevron" brand at the time of the sale, Chevron granted to Cumberland the right to use the Chevron trademark at no royalty for a transition period of two years or for the remainder of the term of each existing dealer agreement, whichever was longer. The parties contemplated that, upon the two-year expiration of the Chevron trademark license, but in no event earlier than the expiration of any existing dealer agreement, the brand name at the Chevron stations would be converted to Gulf.

nonrenewal under the PMPA, but that Chevron nevertheless was taking the precaution of giving at least 180 days' notice of nonrenewal under the PMPA based on Chevron's decision to withdraw from the 10-state area. The notices also stated that, for the remainder of the term of the existing agreements, Chevron's rights had been assigned and its duties delegated to Cumberland, and that Cumberland would honor all provisions of those agreements. The notices recited Cumberland's promise, upon expiration of each dealer's current agreements with Chevron, to offer nondiscriminatory renewal agreements as required by the PMPA.

On March 10, 1986, Chevron sent to all Gulf and Chevron dealers in Connecticut a second and superseding notice of nonrenewal. The March 10 notices were substantively identical to those of February 14, except that they gave a minimum of one year's notice.

REASONS WHY THE WRIT SHOULD BE DENIED

This case presents no conflicts among the Courts of Appeals, no conflict with the decisions of this Court, no novel federal issue, nor any other matter worthy of this Court's attention. All four Courts of Appeals that have considered this issue have adopted similar legal standards, which standards in turn refer to state law. There is no dispute between the parties regarding the proper legal standard, but only with regard to the application of state law to the facts in this case.

I

THERE IS NO DISPUTE REGARDING EITHER THE APPLICABILITY OR CONTENT OF THE STATE LAW CONCERNING ASSIGNMENT. PETITIONERS DISPUTE ONLY THE APPLICATION OF THAT LAW TO THE FACTS IN THIS CASE.

A. The Sole Question Presented Is One of State Law: Whether the Assignments Were Valid Under the Law of Connecticut.

The PMPA requires a plaintiff to show either termination or nonrenewal as a basic prerequisite to any cause of action. Section 2805(c) states:

> "In any action [under the PMPA], the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship."

The courts below properly held that petitioners could not meet this test. Chevron's sale of its northeast marketing assets to Cumberland left undisturbed all of the rights protected by the PMPA. The undisputed facts show that each dealer's franchise remained fully in effect, both before and after the sale. The dealers continued to occupy the same service stations under the same leases; they continued to purchase Gulf brand gasoline under the same supply agreements; they continued to do business under the same Gulf trademarks. They retained all of their rights under the PMPA against their new franchisor, Cumberland.

Thus, an assignment from Chevron to Cumberland occurred; a termination or nonrenewal did not. The PMPA contemplates that franchise agreements between a supplier and its dealers can be assigned without triggering the termination or nonrenewal provisions. Section 2806(b) states:

> "Nothing in this subchapter * * * prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise."

All four Courts of Appeals, including the court below, that have considered this statute agree upon its interpretation. As the Sixth Circuit recently held, a franchisee seeking to establish a PMPA cause of action based on the assignment of his franchise from one franchisor to another must prove either:

> "(1) [T]hat by making the assignment, the franchisor breached one of the three statutory components of the franchise agreement, (the contract to use the refiner's trademark, the contract for the supply of motor fuel, or the lease of the premises) * * * or (2) that the franchisor made the assignment in violation of state law." *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 922 (6th Cir. 1989) (affirming, on facts virtually identical to those here, a summary judgment in favor of Chevron and Cumberland in a PMPA action brought by service station dealers challenging Chevron's sale to Cumberland of its marketing assets in Ohio).

Similar tests were applied both by the Fourth Circuit in *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986), and by the Ninth Circuit in *Fresher v. Shell Oil Co.*, 846 F.2d 45 (9th Cir. 1988).[3]

Petitioners have conceded, and the courts below held, that petitioners cannot establish the loss of any of the three statutory components of a PMPA franchise. Pet.Appx., pp. 29-30. Petitioners have instead contended that the alternative test for a cause of action is satisfied, i.e., that the assignment from Chevron to Cumberland was invalid under Connecticut law. Pet., pp. 26-38.

It is undisputed that the state law applicable here is Uniform Commercial Code section 2-210 (as adopted in Connecticut),

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[3] Other decisions hold that franchises can be assigned without triggering PMPA causes of action. *Burns Bros., Inc. v. RMT Properties Inc.*, Bus.Franchise Guide (CCH) ¶ 8468 (1985-1986 Transfer Binder) (D.Or. 1985), affirmed, 805 F.2d 1039 (9th Cir. 1986); *McGee v. Gulf Oil Corp.*, Bus.Franchise Guide (CCH) ¶ 8379 (1985-1986 Transfer Binder) (N.D.Ala. 1985); *Aldrich v. Amoco Oil Co.*, Bus. Franchise Guide (CCH) ¶ 8322 (1985-1986 Transfer Binder) (S.D.Iowa 1985).

under which contracts between a buyer and seller are made assignable as follows:

> "(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.
>
> "(2) Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract or impair materially his chance of obtaining return performance. * * *." Conn.Gen.Stat. § 42a-2-210.

Under subsection (1) of this statute, Chevron was entitled to delegate to Cumberland the task of fulfilling Chevron's obligations to the dealers. Such delegation did not release Chevron from its contractual obligations to the dealers in the event Cumberland failed to perform. Chevron remained a guarantor of Cumberland's performance.

The only exception to the right to delegate found in subsection (1) expresses the common law rule that duties of a personal nature must be performed by the original obligor. The exception is inapplicable here because Chevron had no contractual obligations to the dealers of a personal nature. Chevron was only a landlord and a commercial seller of branded gasoline, and dealer leases and supply agreements are not personal:

> "Plaintiff argues that the restriction on his ability to assign indicates the contract was personal and therefore nonassignable by Gulf. The court disagrees. The restriction on plaintiff's ability to assign establishes only that his services were, from Gulf's point of view, personal. It does not establish the converse. From the nature of the contracts involved, Gulf's obligations were clearly not of such a personal nature as to prohibit assignment." *McGee v. Gulf Oil Corp.*, Bus.Franchise Guide (CCH) ¶ 8379 (1985-1986 Transfer

Binder) (N.D.Ala. 1985), p. 15,348; accord *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, supra, 869 F.2d at 924.

The only remaining restrictions on assignment are found in subsection (2) of U.C.C. section 2-210, which permitted Chevron to assign its expectation of performance from the dealers, unless the dealers' duties, burdens or risks would be increased, or their chance of obtaining return performance impaired. None of these exceptions applies here.

The undisputed evidence shows that the assignment to Cumberland of the dealers' agreements in no way increased the burdens on plaintiffs in paying for their gasoline, paying their rents or performing their other contractual duties. Pet.Appx., pp. 34-40. Nor is there any evidence that Cumberland is not fully able to fulfill Chevron's contractual obligations to the dealers. Pet.Appx., pp. 29-30.

B. Petitioners' Arguments That the Assignments Were Invalid Are Without Merit.

Plaintiffs argue (Pet., pp. 32-38) that Chevron's sale to Cumberland increased plaintiffs' burdens or risks under their franchise agreements in violation of Connecticut law (U.C.C. § 2-210; Conn.Gen.Stat. § 42a-2-210) because Cumberland, unlike Chevron, was not subject to a Connecticut law (Conn.Gen.Stat. § 14-344) which precludes refiners from directly operating service stations with employees.

However, the fact that Cumberland operated its own company service stations in no way impaired Cumberland's ability to carry out its supply obligations under the assigned contracts. This was demonstrated by the fact that each of the assigned agreements had expired at the time of the ruling below, and petitioners were not able to offer any evidence that any of the assigned agreements had been breached by Cumberland in any way. Pet.Appx., pp. 34-40.

It is correct that Connecticut law precludes refiners such as Chevron from operating company-operated stations. However, it does not preclude distributors such as Cumberland from doing so. In other words, although the Connecticut legislature concluded

there might be a problem with refiner-operated stations, it did not perceive the same problem with distributor-operated stations.

Moreover, the district court found there was no evidence that any of the petitioners' service stations actually compete with Cumberland-operated stations:

> "Although Cumberland undisputedly owns 57 convenience stores selling gasoline in Connecticut, * * * none of the dealers in deposition testimony identified a Cumberland-operated station in his marketing area." Pet.Appx., pp. 37-38.

And, as the district court held, to the extent there was any competition between petitioners and Cumberland-operated stations, there is no evidence that the nature of that competition was any different after Chevron's sale to Cumberland than it was before the sale. Pet.Appx., pp. 39-40.

The two cases cited by plaintiffs (Pet., p. 32) are inapposite. In both *Sally Beauty Co., Inc. v. Nexxus Products Co., Inc.*, 801 F.2d 1001 (7th Cir. 1986), and *Berliner Foods Corp. v. Pillsbury Co.*, 633 F.Supp. 557 (D.Md. 1986), a manufacturer terminated an exclusive distributorship after the distributor was acquired by a competing manufacturer. In ruling that the duties to distribute could not be delegated, these courts merely acknowledged the obvious—a manufacturer should not be required to entrust the exclusive distribution of its products solely to a competing manufacturer. The interests of the acquiring manufacturer are inherently opposed to the proper performance of the distribution agreement.

In this case, by contrast, there is nothing inherent in the relationship between Cumberland and the dealers to preclude Cumberland from being both an effective supplier to the dealers and an operator of stations. Such "dual distribution" arrangements are common in the gasoline industry. Cumberland had every incentive to work cooperatively with the dealers and to assist them in every way possible. Pet.Appx., n. 15, pp. 77-78.[4]

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[4] Petitioners' citation to *Brattleboro Auto Sales v. Subaru of New England*, 633 F.2d 649 (2d Cir. 1980), is similarly inapt. In that case,

Petitioners also speculate that Cumberland may utilize this dual relationship in bad faith to injure petitioners. Pet., pp. 34-38. This is irrelevant to the issue of the validity of the assignments, since the agreements which were assigned have all expired without any actual exercise of bad faith. Furthermore, if petitioners' fears were to be realized in the future, petitioners could obtain redress, both under the PMPA and under the requirements of the Uniform Commercial Code that sellers of goods deal in good faith. U.C.C. §§ 1-203, 2-305(2); Conn.Gen.Stat. §§ 42a-1-203, 42a-2-305(2).

II

THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS

As discussed above (p. 6), all Courts of Appeals that have considered this issue (including both Courts of Appeals that have reviewed Chevron's sale to Cumberland) have established similar tests to determine whether an assignment from one franchisor to another triggers the PMPA. *Ackley v. Gulf Oil Corporation*, 889 F.2d 1280 (2d Cir. 1989); *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917 (6th Cir. 1989); *Fresher v. Shell Oil Co.*, 846 F.2d 45 (9th Cir. 1988); *Barnes v. Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986). The Second Circuit properly held that petitioners cannot satisfy those tests.

Petitioners, however, rely on a district court opinion in *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, Bus.Franchise Guide (CCH) ¶ 9011 (1987-1989 Transfer Binder) (D.N.J. 1987) ("*Florham Park I*"). There, a New Jersey district court held that the assignment of Chevron's northeast marketing assets did trig-

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the Second Circuit held that it was not unlawful (under the antitrust laws or under the Vermont automobile dealer bill of rights) for an automobile manufacturer to terminate its supply relationship with a new car dealer, as apparently permitted by the contract, when the dealer took on a number of competing lines of automobiles. The case does not suggest that the dealer's adoption of competing lines was a breach of the agreement. Indeed, it is common in that industry for dealers to carry competing lines.

ger the PMPA. Although that court purported to rely on the Fourth Circuit's opinion in *Barnes v. Gulf Oil Corp.*, supra, to find a nonrenewal under the PMPA, the court in fact did not find the necessary factual basis for applying *Barnes*. This anomaly was noted by the Sixth Circuit:

> "We find the *Florham Park I* decision to be problematic for three reasons. First, the district court did not find that Chevron or Cumberland breached the pricing provision of the Gulf franchise agreements. Second, the district court did not find that Chevron's assignment to Cumberland of the Gulf franchise agreements was invalid under New Jersey state law. Thus, the district court failed to find the necessary facts to correctly apply *Barnes*. Third, the *Florham Park I* court commented that the 'cases cited by Chevron all involve transactions on a much smaller scale—assignment of a single franchise to a "jobber"—than the Chevron-Cumberland sale of assets.' See id. at 18,419. The district court, however, provided no rationale for its implicit rule that invocation of the PMPA should turn on the size of the challenged transaction. In addition, contrary to the *Florham Park I* court's comments, Chevron cited to *Fresher v. Shell Oil Co.*, Bus. Franchise Guide (CCH) ¶ 8800 (D.Or. 1987), a case which was brought, under the PMPA, by *several* service station dealers. Agreeing substantially with the Ninth Circuit's *Fresher* decision, we decline, on the assignment issue, to follow *Florham Park I*." 869 F.2d at 922-923, n. 3.[5]

In this case, the courts below correctly refused to follow *Florham Park I* on the basis that it would render meaningless section 2806(b) of PMPA, which authorizes the assignment of franchises pursuant to state law. Pet.Appx., n. 9, pp. 71-74. That

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[5] Three other district courts dealing with this same transaction have, in unreported decisions, followed *Florham Park I*. *Smith v. Cumberland Farms, Inc.*, Docket No. 87-1051, Magistrate's Report and Recommendation adopted by Order (W.D.Pa. 1988); *Chestnut Hill Gulf v. Cumberland Farms*, Docket No. 86-3519 (D.Mass. 1988); *Cedar Brook Service Station v. Chevron U.S.A., Inc.*, Docket No. 86-4240 (E.D.N.Y. 1989).

conclusion is, as discussed, in accord with the holdings of each of the Courts of Appeals that have considered this issue.

III

IN ANY EVENT, CHEVRON HAS FULLY COMPLIED WITH THE MARKET WITHDRAWAL PROVISION OF THE PMPA.

Petitioners also address (Pet., pp. 48-55) two issues not reached below, both of which are relevant to Chevron's alternative basis for summary judgment on petitioners' PMPA claims, i.e., that Chevron fully complied with the market withdrawal provision of the PMPA. Section 2802(b)(2)(E), Pet.Appx., pp. 86-88. Because the courts below held that Chevron's sale to Cumberland was not subject to the PMPA in the first place, they did not find it necessary to address these issues. However, Chevron's compliance with the market withdrawal provision provides an additional reason why the judgment below is correct.

A. Chevron Has Determined To Withdraw From the Northeast.

The PMPA authorizes termination or nonrenewal based upon a decision "to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area." Section 2802(b)(2)(E). Petitioners contend that the market withdrawal provision is not available to Chevron, because Chevron continues to operate a refinery in Philadelphia, sells gasoline produced in that refinery to Cumberland, and has authorized Cumberland to utilize the Gulf brand. Pet., pp. 49-52.

If the sale from Chevron to Cumberland does not constitute a "determination to withdraw" from the market under the PMPA, it is difficult to imagine what would. Chevron sold every distribution terminal, every service station, every warehouse, every office, and every delivery vehicle that it owned in the Northeast, together with all of the related inventories and accounts receivable. In short, Chevron sold every single asset that it owned relating to the "marketing of motor fuels through retail outlets in the relevant geographic market area."

Nor does the fact that Chevron sells most of the gasoline output of its Philadelphia refinery to Cumberland negate a market withdrawal. Chevron's gasoline supply contract with Cumberland (Joint Appendix on Appeal to the Second Circuit ("JA") at Vol. VI, pp. 2285-2390) is unrelated to any aspect of Cumberland's compliance with its obligations to plaintiffs under the PMPA or otherwise. The supply contract calls for deliveries in pipeline or barge quantities at Chevron's Philadelphia refinery. The supply contract does not specify that the gasoline is to be resold to "retail outlets" or under any particular brand. Although the gasoline delivered to Cumberland at Philadelphia generally meets the specifications for Gulf gasoline which Cumberland is permitted to resell under its trademark license, Cumberland is free to obtain similarly qualifying gasoline from any source.[6] With or without the Chevron supply contract, Cumberland would continue to sell gasoline to plaintiffs under the Gulf brand. In short, the trademark license and the supply contract are entirely independent of one another. The supply agreement can be terminated without cause by either party at the end of any contract year (JA at Vol. VI, p. 2347), whereas the trademark license will last for at least 15½ years and probably will continue in perpetuity. Pet.Appx., p. 9.

Plaintiffs' contention that Chevron has not made a determination to withdraw has been flatly rejected in other cases:

> "The withdrawal provision of the Act refers specifically to 'marketing of motor fuel through retail outlets.' Chevron's continued refining activity and its sale of the fuel on a wholesale level to Cumberland Farms is not marketing through *retail outlets*. Furthermore, Chevron's licensing of its trademarks to Cumberland Farms is not even 'marketing.' Without question, Chevron motor fuel continues to be marketed in the relevant geographic area; Chevron, however, no longer markets the fuel." *Florham Park Chevron, Inc. v.*

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[6] In fact, Cumberland purchases gasoline from a variety of sources, and 25 to 50 percent of the gasoline sold by Cumberland in Connecticut is purchased from sources other than Chevron's Philadelphia refinery. JA at Vol. III, pp. 890-892.

Chevron U.S.A., Inc., Bus.Franchise Guide (CCH) ¶ 9011 (1987-1989 Transfer Binder) (D.N.J. 1987), p. 18,420 (emphasis in original); accord *Cedar Brook Service Station v. Chevron U.S.A., Inc.*, Docket No. 86-4240 (E.D.N.Y. 1989), p. 16; *Smith v. Cumberland Farms, Inc.*, Docket No. 87-1051 (W.D.Pa. 1988), p. 13.[7]

B. Chevron's Notices of Nonrenewal Satisfied All Requirements of the PMPA.

There is no dispute that notices, dated February 14, 1986, and March 10, 1986, were sent to and received by petitioners in the manner required by sections 2802(b)(1) and 2804 of the PMPA. In each of those letters, Chevron advised all of its dealers that it did not believe the sale to Cumberland triggered the PMPA but that, in the event someone might think differently, Chevron was giving notice of its intent not to renew the dealers' franchise relationships based on Chevron's "determination to withdraw from the marketing of motor fuels through retail outlets" in the Northeast. Pet.Appx., pp. 11-12.

The notice of February 14 stated that nonrenewal, if it occurred at all, would become effective at the later of (i) expiration of the dealer's current agreements or (ii) 180 days after the dealer's receipt of the notice. Pet.Appx., pp. 12-13. The notice given on March 10 was substantively identical to that given on February 14, except that it provided that nonrenewal would occur, if at all, at the later of (i) expiration of the dealer's current agreements or (ii) one year after the dealer's receipt of the March 10 notice. Pet.Appx., p. 13.

Petitioners argue (Pet., pp. 52-54) that Chevron failed to give the 180 days' notice required by section 2804(b) for a proper market withdrawal, because the closing of the sale to Cumberland occurred May 31, 1986, 82 days after the March 10 notice. That argument misperceives the effect of the March 10 notice. The

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[7] See also *Pride v. Exxon Corp.*, 2 Bus.Franchise Guide (CCH) ¶ 9385 (D.Or. 1989), pp. 20,037, 20,040-20,041 (the "market withdrawal" provision of PMPA does not require the supplier to withdraw from "unbranded" sales in the relevant area).

closing of the sale did not operate to terminate plaintiffs' franchise agreements with Chevron. Chevron simply delegated to Cumberland the performance of Chevron's contractual obligations to plaintiffs between the closing date and the effective date of nonrenewal. Chevron's notice gave every dealer a minimum of one year's notice and most dealers received considerably more.

District courts in New Jersey, New York and Ohio have rejected the very argument petitioners make here and held that the notices of nonrenewal given by Chevron satisfied the PMPA:

> "Plaintiffs contend that such notice is insufficient because it is not 180 days prior to May 31, 1986, the effective [closing] date of the Chevron-Cumberland asset purchase agreement.
>
> "Plaintiffs' argument rests on the position that nonrenewal of plaintiffs' franchise relationships occurred on May 31, the date that the assignment of the leases went into effect. However, 'nonrenewal' is defined as a 'failure to reinstate, continue, or extend the franchise relationship at the conclusion of the term, or on the expiration date, stated in the relevant franchise.' 15 U.S.C. § 2801(14)(A). Therefore, nonrenewal occurred for each plaintiff on the expiration date of their prior franchise with Chevron.
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> * * * * *
>
> "The court concludes that Chevron did provide notice within 180 days prior to nonrenewal as required by § 2804(b)(2)(A)." *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, Bus.Franchise Guide (CCH) ¶ 9011 (1987-1989 Transfer Binder) (D.N.J. 1987), p. 18,421; accord *May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, Bus.Franchise Guide (CCH) ¶ 9000 (1987-1989 Transfer Binder) (N.D.Ohio 1987), pp. 18,328-18,329, affirmed, 869 F.2d 917 (6th Cir. 1989); *Cedar Brook Service Station v. Chevron U.S.A., Inc.*, Docket No. 86-4240 (E.D.N.Y. 1989), pp. 18-19.

The Second Circuit has also implicitly recognized the legitimacy of a selling franchisor delegating to the buyer its contractual duties to dealers under existing leases and supply agreements during the period of time between the closing of the sale and the effective dates of the notices of termination or nonrenewal. In *Russo v. Texaco, Inc.*, 808 F.2d 221, 225 (2d Cir. 1986), termination notices were held to be timely even though they were sent several weeks after the closing of Texaco's sale of marketing assets to Power Test.

IV

THE COURT OF APPEALS PROPERLY HELD THAT PETITIONERS WERE NOT "FRANCHISEES" UNDER CONNECTICUT LAW.

Petitioners also claim that, even if the PMPA was not violated, their dealer agreements were automatically renewed (at the prior rents) with Cumberland pursuant to the Connecticut Petroleum Franchise Act (Conn.Gen.Stat. §§ 42-133j to 42-133n). Pet., pp. 55-58. The courts below held that the Connecticut statute was not applicable, because petitioners were not "franchisees" within the meaning of the statute. That decision involves no federal question. Moreover, it is supported by a substantial body of cases, which are cited in the opinion of the district court. Pet.Appx., pp. 42-55.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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